REPORT OF THE

ONTARIO SUPERIOR COURT

JUDGES' ASSOCIATION

SPECIAL COMMITTEE ON

COURT RESTRUCTURING

JUNE, 2000

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Ontario Superior Court Judges' Association. Special Committee on Court Restructuring.
Report of the Ontario Superior Court of Judges' Association Special Committee on Court Restructuring.

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SPECIAL COMMITTEE MEMBERS

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INTRODUCTION

At the Opening of Courts in January of 1997, Chief Justice Patrick LeSage of the Ontario Court – General Division noted,

> We are not disposing of cases quickly enough...Trials are taking much too long. We must find some way to make trials more efficient.

In October of 1997, the *Criminal Justice Review* was established to study the operation of the criminal justice system in Ontario and recommend measures to combat delay and inefficiency. The review was a combined initiative of the judiciary (Chief Justice LeSage and Chief Judge Linden), the Attorney General (The Honourable Charles Harnick), and the Ontario Criminal Lawyers' Association.

The Committee's Terms of Reference were:

> The focus of the committee's recommendations will be on the practical solutions to increase the efficiency of the criminal courts, further reduce delay in bringing matters to trial and shorten trials. Short and long-term solutions will be considered, including the following key areas of the criminal justice system:
>
> (a) pre-trial and release proceedings;
> (b) remand and set date process;
> (c) disclosure and pre-trial resolutions; and
> (d) trial procedure.

The co-chairs were the Honourable Mr. Justice Hugh Locke of the General Division, the Honourable Senior Judge John Evans of the Provincial Division and Murray Segal, Assistant Deputy Attorney General, Criminal Law Division. The committee included members of the judiciary from the Court of Appeal, General and Provincial Divisions, Crown Attorneys, defence counsel, Legal Aid, the Department of Justice, and representatives of Court Operations.

Over a period of seventeen months the full committee met eighteen times. As well, there were numerous subcommittee meetings. The committee did not restrict itself to the members' ideas on improving efficiency. Before making any recommendations it "invited interested members of the public, criminal justice stakeholders, and the judiciary to share their thoughts and ideas on how the criminal justice system could be improved." Sixty-five submissions were received.

After lengthy deliberation and consultation, the committee made 115 recommendations to improve the efficiency of Ontario's courts, thereby providing a thoughtful and detailed analysis of the criminal justice system. The recommendations, if followed, would reduce delay and improve court efficiency. As yet, however, the majority have not been implemented. Those few which have are yet to be evaluated.

At the Opening of Courts in January of 2000 Attorney General, The Honourable James Flaherty, said this about criminal justice in Ontario:

> The justice system of tomorrow will be a service enterprise focused on meeting the needs of the public and moreover, a system that underpins our quality of life, which is part of the broader picture of the quality of life in the Province of Ontario
>
> ... nothing could be more abhorrent than the ultimate failure of the justice system, the loss of cases because of delay.
>
> As you know, we are taking action in two stages to prevent the Askov crisis from ever happening again. First of all, the successful backlog blitz in the Province's six busiest court locations, and the Criminal Justice Review, whose recommendations are now being implemented.
>
> A third stage, I would suggest, should be an examination of key structural changes to the criminal justice system.
>
> We should think seriously, I suggest, about such options as: abolishing preliminary inquiries, which often force victims to testify twice, and which have been eclipsed by case law that now requires full disclosure to the defence; establishing a unified criminal court to eliminate the complexities,

> expenses and delay of moving cases back and forth between two different levels of trial court; and as an interim measure, having all non-jury criminal trials held in the Ontario Court of Justice. (the Quebec model)

The *Criminal Justice Review* gives the government a comprehensive plan for obtaining its objectives without restructuring the criminal justice system. The report is a full, thorough review based on broad input. Delivered about eleven months before the Attorney General's comments at the Opening of Court, it was considered for less than a year. No mention of a unified criminal court appears in the report, nor was one recommended to the committee. The adoption of the "Quebec model" was not discussed. We find it surprising that the same government, with a different Attorney General, without notice or consultation, now maintains there is too much delay, too much duplication, and that consideration should be given to a unified criminal court with the "Quebec model" in the interim.

Nevertheless, the Attorney General has asked for "suggestions for enhancing the quality of service provided by the criminal justice system." The following is our response.

However, we must make one thing clear. In most proposals for court restructuring or procedural change, a detailed outline of the proposals is presented for examination and consultation. To date, the government has not provided such information. Of necessity, this is a preliminary response to the Attorney General's comments. If, and when, the government provides additional information, we will respond appropriately.

THE CURRENT COURT STRUCTURE

The current criminal justice system in Ontario provides for two trial courts. Looking at their respective jurisdiction is a logical starting point for an examination of the present system, but does not present a complete picture of the roles of the Provincial Court and Superior Court. (While the Provincial Court in Ontario is named the Ontario Court of Justice, we will refer to the Court throughout the report as the Provincial Court, which is consistent with the interpretation section of the *Criminal Code*, *s. 2*, and avoids confusion) In addition to jurisdiction, we must examine

- the kind and number of cases
- the time needed for completion, and
- the style and approach of the two courts

Jurisdiction

While the courts share common jurisdiction for most indictable offences in non-jury trials, there are areas that, in practice, are distinct to each court; this is so despite the Superior Court being a court of inherent jurisdiction.

Judges of the Provincial Court preside at:

- some bail hearings (except s. 469 offences) although most are conducted by Justices of the Peace ,
- bail reviews from *Youth Court* where the original hearing was conducted by a Justice of the Peace (s. 8, *Young Offenders Act)*,
- all summary conviction offence trials,
- all trials for hybrid offences where the Crown elects to proceed summarily,
- all trials of absolute jurisdiction offences (s. 553, *Criminal Code),*

- all Crown election offences where the Crown elects to proceed by indictment and the accused elects to be tried in the Provincial Court,

- all indictable offences where the accused elects trial in the Provincial Court except those offences in the exclusive jurisdiction of the Superior Court (murders, accessory after the fact to murder, attempted murder, conspiracy to commit murder, bribery by the holder of a judicial office and a series of rarely used offences. s. 469, *Criminal Code*),

- preliminary inquiries on indictable offences in the exclusive jurisdiction of the Superior Court,

- preliminary inquiries on other indictable offences where the accused elects to be tried in the Superior Court,

- preliminary inquires on hybrid offences where the Crown elects to proceed by indictment and the accused elects to be tried in the Superior Court,

- preliminary inquiries in *Youth Court* cases to be tried in Superior Court (s. 19, *Young Offenders Act),*

- *in facie* contempt of court (s. 484, *Criminal Code),*

- appeals under the *Provincial Offences Act,*

- references by firearms acquisition certificate applicants who were refused a certificate (s. 106 (15), *Criminal Code),*

- appeals from refusals to issue and revocations of certificates and permits for firearms (s. 112, *Criminal Code)*

Judges of the Superior Court exercise exclusive jurisdiction in the following areas:

- all jury trials

- all trials of offences within the exclusive jurisdiction of the Superior Court (s. 469, *Criminal Code)*

- non-jury trials on indictable offences where the accused has elected trial in the Superior Court

- murder trials under the *Young Offenders Act* where the trial is deemed or ordered to be held in the Superior Court (s. 19, *Young Offenders Act)*

- appeals from summary conviction cases tried in the Provincial Court including the *Young Offenders Act*,
- prerogative writs under Part XXVI of the *Criminal Code* including *certiorari, mandamus, habeas corpus* and prohibition,
- contempt of court, *in facie*, in relation to the Superior Court and *ex facie*, for both courts (s. 9 and 10(2), *Criminal Code),*
- abuse of process motions respecting some matters tried in the Provincial Court, [1]
- original bail applications for s.469 offences (s. 515(1) and 522, *Criminal Code),*
- bail reviews by the accused or Crown (s. 520 and 521, *Criminal Code),*
- review of detained accused's trials which have been delayed (s.525, *Criminal Code),*
- bail estreat and forfeiture (Part XXV, *Criminal Code),*
- review of detention of witnesses (s.707(1), *Criminal Code),*
- the release of a person in custody into the custody of a peace officer for the purpose of assisting a peace officer acting in the execution of his or her duties (s. 527(7), *Criminal Code),*
- originating notices of motion for declaratory relief under the *Charter* with respect to the constitutional validity of statutory provisions,
- supervisory review, in appropriate cases, of the disclosure process,
- issuance of wiretap authorizations (s. 185 and 188, *Criminal Code),*
- issuance of proceeds of crime orders and special warrants regarding enterprise crime offences (Part XII.2, *Criminal Code)* These are complex and lengthy applications and frequently involve areas of law with which a generalist court is conversant such as restraint orders, control and management of seized assets, forfeiture and voidable transfers. The proceeds of crime regime requires an understanding of civil and real property law in order to properly interpret the *Criminal Code* provisions.
- special jurisdiction respecting search and seizure such as solicitor/client privilege hearings (s. 488.1, *Criminal Code),* items seized pursuant to conventional warrant authority (s. 490 (3)(8)(9)(9.1)(10)(17), *Criminal Code)* and forfeiture of offence-related property (s.490.2(5), *Criminal Code),*

- issuance of process and compulsion of persons not in the province (s.527(1)(2), 699(2)(b) and 703, *Criminal Code),*
- orders for the release of blood samples for testing (s. 258(4), *Criminal Code),*
- non-broadcast orders respecting the identity of a victim or a witness where there is no presiding justice at the time (s. 486(4.4), *Criminal Code),*
- post-sentence reviews of parole eligibility in murder cases (s.745.6 and 745.6(1), *Criminal Code),*
- applications to eliminate or reduce the term of long term supervision orders (s.753.2(3), *Criminal Code),*
- applications by the Crown to prevent disclosure of information on the grounds of specific public interest (s.37, *Canada Evidence Act),*
- appeals from decisions of the Provincial Court regarding the confirmation or not of the Chief Firearms Officer, Registrar or provincial minister (s.77(1)(2), *Firearms Act).*

The Kind and Number of Cases

Traditionally, the Provincial Court disposes of the majority of criminal charges laid in Ontario. In 1979, the Provincial Court disposed of more than 95% of criminal matters.[2] In 1998 the figure was 97%.[3] With increased hybridization, more charges are disposed of in the Provincial Court. Crown Attorneys elect summary procedure in most cases where the option exists. At the same time, the number of indictments filed and tried in the Superior Court has diminished.[4]

This has led some to conclude there has been a *de facto* transfer of criminal law jurisdiction from the Superior Court resulting in a single criminal court for Ontario, the Provincial Court, leaving the Superior Court to deal primarily with matters of property and civil rights. It has also been concluded that three –quarters of what was previously a significant and difficult Superior Court caseload of criminal matters has been transferred to the Provincial Court.[5] These conclusions fail to take into consideration

the differences between charges and trials, and the nature of criminal litigation in the Provincial and Superior Courts.

In spite of the increased jurisdiction the daily average sitting time of the Provincial Court has not increased significantly over the past few years ('94-5, 4.1 hours and '97-8, 4.3 hours).[6] This apparently anomalous result is understandable when we examine other changes to court procedure and court statistics.

The *Martin Committee* recommendations and the *Investment Strategy* revolutionized criminal procedure in Ontario. Not long ago, trial dates were set and witnesses subpoenaed for trial before disclosure was obtained. Counsel usually discussed a resolution on the morning of trial, a morning with heavy trial court dockets. Often the Crown Counsel who reviewed the file immediately before trial was the first Crown to do so. The emphasis is now on charge screening by Crown Attorneys before the first court appearance, disclosure before trial dates are set, and pre-trial conference or resolution meetings before dates are set. Crown Counsel screen out charges in which there is no prospect of conviction, or amend the charges laid by police. Alternative measures and diversion programs insure that many charges never proceed to a plea or trial.

Crown Counsel now give their "best settlement offer" at the outset, which means fewer cases proceed to a preliminary inquiry or trial. The *Investment Strategy* set the objective of resolving 72% of charges before trial dates were set, and having only 9% of charges proceed to trial. In 1993, for example, about 60% of charges were disposed of before trial and about 10.7% of charges proceeded to trial.[7] While not every jurisdiction achieves the objectives, the new strategies are working well.

The Time Needed for Completion

Focusing on the number of charges does not reflect the judicial activity and time required to dispose of a case. The time required for a withdrawal, diversion, or guilty plea is substantially less than if the matter proceeds to trial or preliminary inquiry. An analysis which treats all charges the same fails to account for this significant fact. For example, a "murder" and "accommodation fraud" are both charges. To treat them the same for statistical purposes illustrates the problem of relying on the number of charges to determine a court's workload.

While subject to some of the noted frailties, a more meaningful analysis examines cases since one incident can result in multiple charges. The Ministry of the Attorney General's *Court Statistics Annual Report, Fiscal Year 1998/1999* provides the number of charges and indictments in the Superior Court, but does not include the number of informations for the Provincial Court. Since there are roughly three *Criminal Code* charges per indictment, the number of charges disposed of in the Provincial Court significantly inflates the number of cases.[8]

We must examine what is needed to complete a particular case or charge. In the United States this is referred to as the "case weight."[9] Without a similar analysis available, to compare 500,000 charges laid in the Provincial Court with 4,189 indictments added or 4,586 indictments completed, in the Superior Court, both distorts and misleads.[10]

In spite of the difficulties inherent in charge analysis, hybridization has resulted in more charges being disposed of in the Provincial Court. However, to conclude the Superior Court has effectively gone out of the criminal law business ignores three

factors - the frailties inherent in relying upon statistics using charges, the difference between Superior Court trial statistics and reality, and the Superior Court's exclusive criminal law jurisdiction in non-trial matters.

The overall percentage of judicial resources assigned for criminal work in the Superior Court is roughly 37 - 38 % at any given time.[11] Criminal trials are considerably longer now than in the pre-Charter era. What was a one to two week trial in 1980 is now likely to be a one to two month trial.

Fifty-two percent of the trials conducted in the Superior Court between 1996 and 1999 were jury trials, which in themselves are longer than non-jury trials, particularly with increased challenges for cause.[12] The average length of jury trials has dramatically increased, with many trials lasting several months. For example, a recent special assignment court in Toronto listed seven cases, all scheduled for from three to eight weeks, while a previous list included one estimated for four to six months and a second for three months.[13]

While the Provincial Court targets trials on 9% of charges, the percentage of cases which proceed to a contested trial in the Superior Court is significantly higher. Examining withdrawn indictments, guilty pleas, trials held, and bench warrants issued, between 1997 and 1999, 36% of indictments proceeded to trial. Because of the relatively new procedures designed to resolve cases at the earliest opportunity, Superior Court cases are more likely to proceed to trial than before.

When one adds to this workload over a thousand bail reviews and initial bail applications, over a thousand summary conviction appeals and the other areas of exclusive jurisdiction listed above, an accurate picture of the Superior Court's

involvement in criminal law emerges.[14] While the Provincial Court carries a heavy workload in criminal law, so does the Superior Court.

Style and Approaches of the Courts

The above analysis helps to illustrate the fundamental difference between the two courts. In general, the Provincial Court works on hourly and daily schedules with the vast majority of their cases being resolved without trial; those proceeding to trial or preliminary inquiry are scheduled primarily for a number of hours, less frequently a number of days and, on occasion, for weeks. Where insufficient time has been allotted for the trial or preliminary inquiry the continuation date is often several weeks or months later. In the Superior Court trials are occasionally scheduled for months, usually for weeks and, on occasion, for days.

The cases tried in the Superior Court are determined in three ways. First, Parliament has determined that some indictable offences are so serious they must be tried in the Superior Court. Second, Parliament has determined that most indictable offences can be tried in the Superior Court, on election by the accused. Third, in hybrid offences, Crown counsel can choose to proceed by indictment.

The *Report of the Ontario Courts Inquiry, 1987,* (The Zuber Report) concluded the Provincial Court was geared to handle a very high volume of cases with maximum dispatch and minimum cost.

The Superior Court, on the other hand, has fewer but longer cases, normally requiring written judgments, rulings and jury charges in criminal matters.

All judges in criminal cases in Ontario contribute to the administration of justice and provide the public with a high quality of justice. They are competent and dedicated. While sharing jurisdiction on most indictable offences, the judges of the two divisions preside over cases that differ in style, volume and type. The public is well served by the complementary two-tiered structure, each with its own strengths, and each presided over by men and women of high quality who, for their own individual reasons, sought appointment to the particular court on which they serve.

COURT RESTRUCTURING AND THE ADMINISTRATION OF JUSTICE

While courts should be efficient and avoid unnecessary delay, the measure of any court must be the quality of justice it dispenses. In the post-*Askov* era, one of the regrettable by-products of that crisis is a preoccupation with quantity over quality in the justice system's most visible component, criminal law. To regard the justice system as a "service enterprise" risks undermining the quality of justice. In the effort to provide an efficient and timely procedure, the quality of justice and fairness must not be sacrificed on the altar of expediency.

As Professor A.W. Mewett wrote in 1990:

> ... efficiency is no doubt a very desirable thing, but justice is even more desirable. The starting point for any reform, whether of the court system or anything else, cannot and must not be allowed to be efficiency for the sake of efficiency. The goal of reform must be the furtherance of justice. [15]

Any proposal for court restructuring or procedural change must start with an analysis of the problem to be solved. Is it real or perceived? Is it advanced by informed or uninformed observers? Is the statistical data sufficiently reliable and detailed to reach an informed conclusion?

If a problem has been identified it is essential to determine the nature and extent of the problem. Is it systemic, requiring fundamental restructuring or procedural changes? Is it a local problem found in one centre or region, or is it case-specific? A case-specific problem may be an aberration, not something mandating structural or procedural changes to the entire court system. Once a valid concern has been identified, any solution must guarantee an equivalent or better quality of justice.

In his speech, the Attorney General noted the O.J. Simpson trial took 474 days from arrest through trial, while in Ontario "we all know of murder cases pending for three, four, five or even six years after the arrest." The reference illustrates the problem of using an example without presenting the full picture, and using one or several cases out of thousands as a catalyst for change. This is the first time any member of the committee is aware of anyone proposing the *Simpson* trial as a positive model of efficiency or an exemplar of justice in action.

In addition, the Attorney General noted, referring to delays in trials, "You can understand why people find this level of service hard to accept and public confidence in the justice system is shaken." Given the widespread public reaction to the verdict in the *Simpson* case, we suggest that trial did more to shake public confidence in the justice system than trial delay. Indeed, California has speedy trial legislation which can require trials be held within 60 days unless the accused waives his or her right to a speedy trial. While the *Simpson* case had such a waiver it still involved giving the case precedence over others. Finally, it is not unusual for murder trials in California to conclude two years after the arrest. [16] In Ontario, trials far more complex than *Simpson* have been completed in less trial time than *Simpson.*

The reference to murder trials pending for from three to six years requires an examination of the reasons for the delay in those cases, as well as the pre-trial delay time for other murders. Is the problem systemic, regional, local or case-specific? In the absence of a systemic problem there is no need for structural or procedural changes province-wide. If there is a problem in Toronto there is no need for a provincial solution. Neither local problems nor aberrations should provide impetus for major re-structuring.

Given the time available to prepare this initial report, a detailed analysis of every murder trial in Ontario was not feasible. However, we did examine 76 murder trials occurring since 1995 which revealed the following times from first appearance in the Court of Justice to verdict: under 12 months, 8.3 %, 12 - 18 months, 25 %; 18 – 24 months 28.9 %; 24 - 30 months, 14.5 %; 30 - 36 months, 9.2 %; 36 – 42 months, 2.6 % and over 42 months, 7.9 %. These cases indicate 89.4 % of murder trials are completed under the time frame the Attorney General indicated as causing concern.

It should also be remembered that the Supreme Court of Canada has indicated as a guideline that delay in the range of 14 – 18 months after the intake period to the start of trial does not violate s. 11(b) of the *Charter.* [17] The intake period for murder cases is generally longer than the norm because of the volume of disclosure including reports from the Centre for Forensic Sciences. In addition, longer and more complex cases have been acknowledged to take longer to get to trial and not breach s. 11(b).[18]

No doubt some trials are delayed for lengthy periods. However, the reasons for the delays must be examined. Once it is determined why a particular case was delayed an informed decision can be made regarding what, if any, changes are required to remedy the problem. Examining a small percentage of cases should not be the basis for structural change.

By way of examples, the *Just Desserts* trial is no doubt one of the cases to which the Attorney General was referring. In that case judicial criticism has been directed to an unfortunate and unusual incident in the course of the preliminary inquiry, the conduct of court security, the actions of some defence counsel and Crowns. In Ottawa, one long murder trial became two long murder trials, when the Crown, in the midst of a joint trial

for four accused, advised it would be calling a new witness with whom one of the defence lawyers had a conflict. Rather than declare a mistrial for all accused the trial judge severed two accused and the first trial proceeded to a conclusion. A second trial was required for the severed accused.[19] A third lengthy case was completed in Barrie after trial delays caused by a conflict of interest on the part of defence counsel, one of the accused becoming ill, and a relative of one of the jurors becoming ill.[20] These cases are not representative of the normal time taken to complete a murder trial in Ontario.

We agree that public perception and confidence must be maintained in the administration of justice. Those perceptions, however, must be derived from an informed public, a public that recognizes the difference between exceptions and the norm, and a public that understands the reasons for lengthy prosecutions. The public must also appreciate the benefits of one trial with delays, as compared with a "speedy" trial resulting in a successful appeal, followed by a second trial.

DELAY

As a result of the combined efforts of the judiciary, Crown Attorneys, defence counsel and court administrators, pre-trial delay has been significantly reduced across Ontario since the decision in *Askov*. Although the Attorney General spoke of the bench and bar tending to focus on the specific case before them and losing sight of the larger picture, his comment fails to recognize the countless hours members of the administration of justice have spent on committees such as the *Martin Committee, Criminal Justice Review* and local bench and bar groups, all with a view to improving the administration of justice in Ontario. We agree there are still areas of concern. The public has a right to be concerned about cases not getting to trial for several years. However, the starting point for any analysis is the reasons for the delay.

The Attorney General mentioned the "complexities, expense and delay of moving cases back and forth between two levels of court." We disagree with the assertion there are complexities in court structure. The court levels are straightforward. The multiple classification of offences in the *Criminal Code* may be complex but that does not relate to the levels of courts. The reference to the expense and delay caused by cases moving back and forth is troubling if one believes many cases are committed for trial in the Superior Court and then returned to the Provincial Court. The number of cases in which that occurs is about 1%. [21] Most are remanded back for a plea of guilty which completes the case more quickly than a trial in the Superior Court. There is no realistic basis of concern for cases going "back and forth."

There can be delay between the committal for trial and the commencement of proceedings in the Superior Court. That time has been reduced in many jurisdictions in

which the Provincial Court trial office has Superior Court pre-trial dates available, so that the accused is remanded directly to the mandatory pre-trial instead of a monthly or bi-weekly assignment court and then to the pre-trial.

The quality of justice in Ontario is high. The delays which occur are caused by the number and complexity of cases as well as human failings of counsel, judges, witnesses and accused. Most of the delay cannot fairly be attributed to a system which functions remarkably well for anything as personal and important as the criminal justice system. When the following summary of the primary reasons for delay is examined, it is clear structural change will not solve the problems.

Reasons for Delay in Getting to Trial

1. Inadequate Judicial Resources – Cases cannot proceed to resolution, trial or preliminary inquiry if governments responsible for filling judicial vacancies do not appoint new judges in a timely fashion. This is particularly so in smaller centers served by the Provincial Court. It is inconsistent to champion efficiency and delay reduction while failing to fill judicial vacancies in a timely fashion. It is difficult for administrative judges to properly utilize judicial resources which do not exist.

2. Inadequate court facilities – Cases cannot proceed to resolutions, trials or preliminary inquiries if the Province has not provided sufficient courtrooms. While steps have been taken in some jurisdictions, adequate facilities are not available in many centres.

3. Inadequate police investigations – when the police have not properly investigated alleged crimes, delays occur where Crown Counsel or pre-trial judges direct matters to be investigated which should have been explored earlier.

4. Inadequate or late disclosure – In 1999 the *Criminal Justice Review* concluded "there continue to be cases where issues relating to Crown disclosure significantly delay the commencement of trial proceedings ..."

5. Forensic Reports – Despite increased funding to the Centre for Forensic Sciences, long delays still occur before scientific reports are available to counsel.

6. Wiretap Evidence – Impacting on all these areas is the requirement that the accused have full disclosure before any elections, pleas, or meaningful pre-trials take place. Where lengthy wiretap evidence is to be introduced, preparing the mandatory transcripts is time consuming and frequently delays proceedings. Aggravating this problem is a position taken in some cases by the police that they will not prepare the transcripts until a trial or preliminary inquiry date is set.

7. Conspiracy Prosecutions – Often the police charge multiple accused with conspiracy counts. The retention of counsel by each accused, the obtaining of disclosure and the scheduling of counsel, all contribute to delay.

8. Severing Accused – Often Crown Counsel will start a case with several accused and then decide to call one accused against the others and vice versa. This results in multiple prosecutions and delays the trial of those to be tried later.

9. Retainers – Whether by way of private retainer or Legal Aid, it takes times to finalize retainers. For longer cases, counsel are reluctant to commit to the entire proceeding on the basis of a limited retainer. With Legal Aid, delays occur while the accused provides the required information; some appeal the refusal or payment agreements required.

10. Stalling Accused – Some accused deliberately try to delay their trials by putting off applying for legal aid or not providing private retainers. Where a trial judge thinks it appropriate to proceed without counsel, the Court of Appeal often orders new trials where accused have been required to proceed without counsel.[22]

11. Counsels' Schedules – accommodating busy counsel, particularly in cases involving multiple accused can be difficult. The same concerns noted above arise if the accused is forced on without counsel or without the counsel of choice.

12. Commission Evidence – Increasingly, witnesses from other countries will not, or cannot attend trials in Canada. The result is commission evidence requiring all counsel to travel to other countries to obtain the evidence.

13. Psychiatric Assessments – Often the accused will require a psychiatric assessment during which the proceedings are effectively put on hold. Once the accused indicates he or she will be raising a psychiatric defence, the Crown generally seeks its own assessment.

14. Inefficient Pre-trial Conferences – On occasion, counsel will attend a pre-trial conference before the preliminary inquiry without having addressed their minds to the triable issues and appropriate length of time to be set aside for the hearing. The result is a continuation, often months later, when the allotted time is inadequate for the completion of the hearing.

15. "Everything-in-issue" Preliminary Inquires – On occasion, counsel will make no concessions regarding elements of the offence such as identity, or evidentiary issues such as the continuity of exhibits, wiretap evidence, and technical issues of admissibility. In most cases these matters are readily capable of proof but can be time-consuming.

16. Transcripts – On occasion, trial dates have to be adjourned or set outside the normal trial schedule because transcripts of preliminary inquiries or previous trials are not available. The Integrated Justice Project is addressing the issues of court reporting and should improve the availability of transcripts in a timely fashion .

Reasons for Trials Taking Longer to Complete

1. The Canadian Charter of Rights and Freedoms – The advent of the *Charter* has dramatically altered criminal trials in Canada. Now with pre-trial exclusion motions, what was formerly a one to two week trial will last a month or more.

2. Challenges for Cause – Challenging prospective jurors for cause used to be a relatively rare event. They are now commonplace in our multicultural society and frequently add a day or more to the time required for jury selection. Cases currently before the Supreme Court of Canada on offence-based challenges may further expand the frequency of this procedure.

3. Interpreters – As our multicultural society has produced longer jury selection, so has it also increased the need for interpreters for witnesses and accused. Of necessity, trials with interpreters proceed at a slower pace.

4. Unrepresented Accused – More frequently, accused persons appear for trial without counsel. A trial without counsel requires the trial judge to explain the procedures and options available to accused. In some case, unrepresented accused deliberately disrupt and delay proceedings.

5. Hearsay Evidence – In recent years the Supreme Court of Canada has expanded the use of what used to be inadmissible evidence. In cases such as *Khan* and *K.(G.B.)*, the Court permitted the introduction of out-of-court

statements of children and recanting witnesses.[23] This expansion has served the public and the administration of justice well, as judges and juries are provided with more evidence from which to determine the issues. However, the admissibility of the evidence almost invariably involves a lengthy *voir dire*.

6. Third Party Record Applications - Parliament has determined that only trial judges may hear applications for the production of records relating to a complainant or witness that contains personal information for which there is a reasonable expectation of privacy.[24] The *Criminal Code* sets out the procedures to apply to the trial judge to order the record produced to the judge for review and a determination whether the records should be disclosed. The process often includes counsel appearing for the complainant and record holders. When the records are produced, editing is often required; when disclosure is made the trial may be interrupted as a result of late disclosure. The procedure protects the privacy interests of the witnesses while balancing the right of the accused to make full answer and defence. It is time-consuming and lengthens the time required for trial.

7. Inadequate Time Estimates – Counsel often underestimate the time required to try a case - a direct result of poor preparation for pre-trial conferences. When a case takes longer than scheduled, the result is that other cases are adjourned to later dates or the trial is completed in installments, an inefficient process that rarely serves the best interests of the parties or the administration of justice.

While unforeseen events will never be eliminated from trials, many of the issues which take court time (or more court time than estimated) are foreseeable.

8. "Everything-in-Issue" Trials – As noted above, on occasion, counsel will not admit technical or readily provable elements of the offence or preconditions to admissibility. In some cases, arguable issues are raised. However, the blanket approach of "no admissions" raises concerns.

9. Defence Experts - Where the defence does not disclose the nature of expert evidence to be called, trials have to be adjourned while the Crown retains an expert to advise and/or give evidence.

THE PRELIMINARY INQUIRY

The stated objective of the Attorney General's proposals is the reduction of delay in getting cases to trial. There is no empirical evidence to support the contention that a unified criminal court or the Quebec model in themselves would reduce delay. It could be suggested that delay would be reduced if the adoption of either the unified criminal court or the Quebec model were accompanied by abolishing or changing the preliminary inquiry. Before making such a proposal to the federal government, however, the provincial government should consider the value of the preliminary inquiry as perceived by those who favour its preservation. Advocates of the continued existence of the preliminary inquiry make the following arguments:

1. Preliminary inquiries do not consume an inordinate amount of Provincial Court time. The *Criminal Justice Review* notes the available statistics showed the percentage of court time at 6.68%.[25] With increased hybridization of offences, preliminary inquiries are less frequent and reserved for the most serious offences. Moreover, many preliminary inquiries are waived and no evidence called.
2. A properly conducted and focused preliminary inquiry benefits the Crown, defence, administration of justice and the public. The hearing permits both parties to assess the strengths and weaknesses of their case. The preliminary inquiry often results in an outright resolution or in a shorter trial with restricted issues. A properly conducted preliminary inquiry can be an instrument of efficiency in the criminal justice system. The public benefits because cases

which can be resolved after each side assesses their case do not proceed to trial and cases which proceed on the basis of restricted issues are more efficient. Witnesses are not required to testify twice in matters where there is a discharge, guilty plea before trial, or where issues are restricted.

3. Disclosure does not remove the usefulness of a preliminary inquiry nor provide the essential component of discovery. *Re Cover and the Queen* (1988), 44 C.C.C.(3d) 34 (Ont.H.C.); *R. v. George* (1991), 69 C.C.C.(3d) 148 (Ont.C.A.) Statements taken by police often do not address the key issues in trials, or do so in a superficial manner. For example, a statement may indicate the witness said the accused "had been drinking" or "was drunk," terms which can mean different things to different people and may be determinative of trial issues. Many times, the disclosure is nothing more than the officer's notes, summarizing the words of the witness.

While disclosure in criminal cases is put forward as the equivalent of discovery, it should be noted there is no suggestion that parties in civil proceedings, where liberty is not at issue, should no longer attend for examinations for discovery. Discoveries are still considered essential to a fair trial.

R. v. Stinchcombe was released in 1995.[26] In 1999 the *Criminal Justice Review* concluded:

> Following the release of the *Martin Committee Report,* the Attorney General issued a new directive on disclosure based on the principles and recommendations outlined in the report. While this new directive and judicial decisions interpreting the Crown's disclosure obligations have settled most of the outstanding legal issues concerning the required content of Crown disclosure, numerous implementation and logistical problems remain unresolved. As a result there continue to be cases in Ontario

> where issues relating to Crown disclosure significantly delay the commencement of trial proceedings or result in adjournments, stay of proceedings or mistrials.[27]

4. If the case is not resolved before trial, witnesses may have to testify twice as they do in civil cases. Where a witness has to testify twice, it only occurs in the more serious cases. If major contradictions occur between preliminary inquiry testimony and that given at trial, the trier of fact should be able to consider that inconsistency. If counsel wish to pursue innocuous or non-existent discrepancies they do so at their client's peril.

   Preliminary inquiry and trial judges have the means to, and do protect the dignity and integrity of witnesses. New witness assistance programs now offer a wide variety of support to witnesses.

   Where concerns exist for the health of the witness, provisions are available to have preliminary inquiry testimony read into evidence (s. 715, *Criminal Code*) or introduced under the principled exception to the hearsay rule.[28]

5. On occasion, preliminary inquiries do go "off the rails." So do trials and bail hearings. No one would suggest that bail hearings and trials be abolished because a few cases are longer than anticipated. Rather than assuming the preliminary inquiry itself is to blame, the reasons why the case proceeded as it did must be examined. Are the explanations and problems which emerge case-specific, localized or systemic issues? Will the proposed solution guarantee the same or better quality of justice?

6. Where the Attorney General determines a case will not or has not proceeded at an appropriate pace, and where the case is of significant public interest, or for other reasons, a preferred indictment is available. (s. 577, *Criminal Code*)

7. The preliminary inquiry permits both counsel to explore potential *Charter* issues for trial. If the evidence presented does not support a pre-trial motion to exclude evidence or stay the proceedings, trial time is reduced. If the evidence supports such an application, in many cases the record from the preliminary inquiry forms the basis for the application. This reduces trial time since little, if any, further evidence is required for the trial judge to determine the issue.

   It may be suggested that hearing evidence on *Charter* issues which cannot be adjudicated upon at the preliminary inquiry results in the preliminary inquiry being the same length as a trial. This ignores the fact there are no arguments presented on *Charter* issues and no judgments required on the applications. At trial, these rulings are often lengthy and require written judgements. A trial is generally longer than a preliminary inquiry on the same matter and in many cases significantly longer.

8. Similarly, there are many cases where the production of third party records (O'Connor applications, *Criminal Code,* s. 278.2) and examination of the complainant's previous sexual conduct (Seaboyer applications, *Criminal Code,* s. 276) are argued at trial after an evidentiary foundation is established at the preliminary inquiry, or not argued because the preliminary inquiry revealed there was no basis for the application. Without a preliminary inquiry, if the evidence emerges at trial to support an application, trials will be interrupted, perhaps for

lengthy periods as these issues are resolved. In these situations neither the public, the participants nor the administration of justice are well-served.

9. The key to an effective, efficient and focused preliminary inquiry is a properly conducted pre-trial conference. This requires prepared counsel who have examined the issues before the conference and determined what issues should be the focus of the inquiry and what should not. As the anticipated length and complexity of the case grows, so does the need for an effective pre-trial conference. In many cases, responsible counsel will have discussed and determined the key issues and anticipated length before the hearing.

An effective pre-trial conference also requires input from the presiding judge. This is particularly so when counsel have been unable to agree on issues. The *Criminal Justice Review* made the following recommendation in this area:

> The Criminal Justice Review Committee recognizes that the judiciary in Ontario is highly qualified and able, but that not every judge may be suited to or interested in conducting judicial pre-trial conferences.
>
> Administrative judges should give careful consideration to the selection of judges conducting pre-hearing conferences. Judges conducting pre-hearing conferences should be experienced in criminal law, knowledgeable with regard to the range of penalty for offence, and be able to facilitate the resolution of issues.[29]

10. Methods exist for reducing both court time and the attendance of witnesses for preliminary inquires. They are seldom used. First, property owners need not attend court for preliminary inquires or trial, unless the judge orders, to prove ownership or the value of property provided they have sworn an affidavit or solemn declaration on those issues. (s. 657.2, *Criminal Code*) The section is

rarely used. Encouraging the use of these affidavits would result in shorter preliminary inquiries and less inconvenience for witnesses.

Second, in narcotics prosecutions, the continuity of possession of any exhibit tendered as evidence may be proven by the affidavit or solemn declaration of the person claiming to have had it in their possession, subject to a judge ordering the affiant or declarant to appear for examination or cross examination. (s.53, *Controlled Drugs and Substances Act*) Again, this method is rarely used. Those who advocate a speedier trial process have the means at their disposal to achieve their objectives yet fail to utilize them.

Third, some preliminary inquires can be held out of court, where the parties wish to hear certain witnesses but committal is not in issue, or where counsel agree to argue committal on the basis of the transcript. Court time is saved and resources can be used for other cases. While not an appropriate method for all preliminary inquires, where both counsel consent, the procedure is useful. It is rarely used.

11. The *Criminal Justice Review* recommended expanded use of affidavit evidence at preliminary inquiries.[30] Documentary evidence could be used to establish the continuity of exhibits in *Criminal Code* prosecutions, for non-contentious witnesses and to establish the time, date and place of intercepted private communications and "911" calls." While amendments to federal legislation would be required to authorize the use of these affidavits, the *Criminal Justice Review* suggested the rules of both trial courts be amended to permit the reception of this evidence, subject to an order of the presiding judge that the declarant attend.[31]

12. Recent examples of wrongful convictions suggest the exercise of extreme caution before removing an essential component of the right to make full answer and defence to serious charges.

THE UNIFIED FAMILY COURT

It may be suggested that a unified criminal court is the next logical step after the creation of the Unified Family Court. That suggestion fails to consider the rationale for establishing the Unified Family Court and the lessons to be learned from that court.

There is no single solution for every perceived problem in the judicial system. One must first determine whether there is a problem, and if so, determine if it is case-specific, localized or systemic. The rationale for the creation of the Unified Family Court is found in the following conclusion of the *Zuber Report*:

> ... the jurisdiction in family law matters is spread among all three levels of courts. In general terms, the Provincial Court (Family Division) is empowered to deal with custody of children, support of children and spouses, crown wardship and the enforcement of support orders of other courts. The District Court has jurisdiction over custody, support of children and spouses and the division of family property. District Court judges acting as local judges of the High Court, and the judges of the High Court have jurisdiction over custody, support, the division of property and divorce.
>
> The deficiencies in this jurisdictional mosaic are obvious. Parties to a family dispute are sometimes involved in more than one court at the same time because each spouse may commence proceedings in a different court. Further, there are those who commence proceedings in the Provincial Court and find that only a partial resolution of their problems is possible and that they are obliged to go to a second court to resolve the property and divorce issues that remain outstanding. The Provincial Court (family Divisions) finds that there are difficulties in enforcing the support orders of the District Court and High Court. In those cases where circumstances have changed, the Provincial Court is powerless to vary the order. Parties are obliged to go to the court that made the order to address the issue of variation and then return to the Provincial Court to deal with the issue.[32]

While the remarks refer to the former three level court structure which existed at the time Unified Family Courts emerged, they reflect family law problems before and after merger. Those problems do not exist in criminal law. Although both criminal trial

courts share some jurisdiction, there are no parallel proceedings occurring, as was the situation in family law. In addition, the current two level criminal trial court structure was intentionally established by federal legislation as opposed to being the by-product of the distribution of legislative authority in the *Constitution Act.*

A second important distinction is found in the approach of the Unified Family Court - the provision of a wide range of legal and social strategies for the resolution of disputes, through conciliation and counseling. Mediation, in the view of many, is the cornerstone of the court. In criminal law there is mediation for minor offences in the Provincial Court, in some locations. For serious criminal offences this fundamental approach of the Unified Family Court is not appropriate.

The Unified Family Court was first established in Hamilton as a pilot project in Hamilton in 1977. In 2000 the Provincial Government has committed to expand the court province-wide. However, 23 years after the pilot project started only 40% of Ontarians have access to the court.

The continued expansion of the Unified Family Court will continue to create administrative issues that will challenge and engage the time and attention of the Superior Court for years to come. To add the unification of the criminal courts would result in administrative problems that could threaten the integrity of the entire court system of the Province.

There is a lesson to be learned from the Unified Family Court in relation to the proposed unified criminal court. It involves the emergence of subordinate judicial officers. As will be seen in the next chapter dealing with unified criminal courts, this is a hallmark of court unification and runs contrary to one of the objectives of unification,

removing the hierarchy in courts. Increasing use of Dispute Resolution Officers in some jurisdictions results in some judicial functions being delegated to non-judicial officers.

While the Unified Family Court may efficiently deal with the problems specific to family law, the problems, real and perceived, in the criminal justice system are not the same. The approach of the Unified Family Court is directed to particular concerns of family law not present in criminal law.

A UNIFIED CRIMINAL COURT

Since we have received no details of the proposed unified criminal court, our analysis will focus on the concept of criminal court unification and the positions presented in earlier proposals.

A threshold question - what court structure is envisaged for such a court? Is it to be a separate court with one level or class of specialist judges doing only criminal cases? Is it to be a division of a single trial court with generalist judges who would rotate through the various areas of law-specific divisions? Our research reveals no jurisdiction in North America which has the former style court. Earlier proposals suggested the latter approach, a single trial court with generalist judges. Lacking any indication of the type of court proposed, we will examine both options.

Background

The concept of a unified criminal court was first discussed by Roscoe Pound in 1906.[33] To date, several American states have adopted variations on the proposal. [34] In Canada, the *Report of the Ontario Courts Inquiry, 1987, (The Zuber Report)* rejected structural court divisions along functional lines, noting,

> It is not apparent that this plan contains any substantial benefit to the public in terms of accessibility or efficiency ... the radical changes involved in the three unified court proposal fall outside the ambit of realistic expectation of success.[35]

The Law Reform Commission recommended a unified criminal court in 1989, citing difficulties of complexity, confusion, inefficiency, and inequality.[36] The Law Reform Commission paper was one of a series of suggestions for completely revamping the criminal law and courts in Canada. It is difficult to divorce the unified criminal court

proposal from their other suggestions in substantive and procedural criminal law. Yet, no paper was ever produced on appellate court restructuring, a key component of any change.

In 1989 Ontario Attorney General Ian Scott introduced a proposal for structural change which included, as part of Phase II, a unified criminal court. Following a change in government in September of 1990, Phase II was never implemented.

A number of legal organizations have examined the establishment of a unified criminal court over the years. The proposals were analyzed and positions taken. It is instructive to recall the conclusions reached and positions taken previously.

In 1990, the Joint Committee on Court Reform, composed of the Advocates' Society, the Canadian Bar Association of Ontario and the Criminal Lawyers' Association concluded:

> In the interest of the public in maintaining the quality of our justice system, we urge the Attorney General of Ontario to abandon all plans to implement Phase II for criminal law. We urge him to improve the quality of justice by providing adequate funding, adequate facilities and improved administration.[37]

The report was also endorsed by the Criminal Lawyers' Committee of the Sudbury District Law Association, the Hamilton Criminal Lawyers' Association, the Defence Counsel Association of Ottawa, the executive of the London Criminal Lawyers' Association and the Windsor Criminal Lawyers' Association.

In 1990, the Provincial Attorneys General unanimously proposed a unified criminal court, while the Judicial Council rejected the concept in 1991. The Judicial Council had commissioned a study by Professor Carl Baar, *One Trial Court - Possibilities and Limitations* prior to taking their position in opposition. The Canadian

Bar Association's 1991 *Task Force Report on Court Reform in Canada* rejected the concept of a unified criminal court. The report of the Manitoba Aboriginal Justice Inquiry recommended a unified criminal court in 1991.[38] In 1994 the New Brunswick Department of Justice proposed New Brunswick as a site of a pilot project for a unified criminal court.[39] The court was never established.

Identifying the Problems

No structural change should be undertaken until there is an analysis of the problems and a determination made that the proposed solution is not only responsive to the problem but, of greater importance, will ensure the same or better quality of justice.

1. ***Administration***

When examining the concerns with the current justice system, a clear distinction must be drawn between inefficiencies in administration, and inefficient court structure. The unification of courts as an administrative organization and the unification of the judiciary are very different proposals aimed at different perceived problems. Many of the concerns raised about inefficiency relate to administration, not court structure. As the 1991 Canadian Bar Association Task Force Report concluded:

> The experience of the Crown Court in England suggests that a single administration can successfully manage a court composed of three different levels of judges. We think it wrong to say that a unified court structure is a necessary condition for unified administration and management.[40]

From an examination of the American State Courts the same report reached the following tentative conclusion:

> Structural unification on its own is not likely to bring about the sorts of improved performance which are the stated goal of unification. Improved trial court performance depends more upon effective management than it does on court structure.[41]

The 1990 Joint Committee on Court Reform Report concluded:

> Court structure ought not to be sacrificed on the altar of administrative efficiency where there are equally effective ways of promoting administrative efficiency in the overall criminal justice system.[42]

A single administration for the criminal courts should be studied to determine if a more efficient justice system would follow. In our view, a cooperatively administered two-level trial court could solve any problem of staff duplication.

On his return from a visit to Nunavut, the Attorney General commented that he was impressed with a system where the public can go to the front counter of the courthouse and do everything from filing a small claims court case, to appealing a conviction, to inquiring about legal aid.[43] The one-stop-shopping approach can only be achieved in consolidated courthouses where the single counter vision is a reality without structural change. In the vast majority of the Province, (including Toronto with nine separate buildings and roughly 30% of the charges,) multiple facilities make the "one-stop" shopping concept unattainable without an enormous capital outlay by the Provincial Government.

2. *Complexity*

It has been suggested the current criminal court structure is complex. We disagree. While there are areas of criminal procedure which may be regarded as complex, such as the classification of offences, court structure in Ontario is not complex. Whether a system is complex or confusing must be seen through the eyes of people who have taken some time to familiarize themselves with the subject. There is no evidence the public or the bar are confused about court structure. As the 1991 Canadian Bar Association Task Force concluded, "The problem is more the product of the law of criminal procedure than of court structure."[44]

3. *Delay*

A unified criminal court alone will not reduce the time from arrest to disposition in any meaningful way. There will remain the intake procedure, pre-trial conferences, early resolutions, trials or preliminary inquiries. There is no evidence to support the claim a unified criminal court would reduce delay. The 1991 Canadian Bar Association research suggested that the existing system can manage delay, when given sufficient resources and soundly managed. To suggest a new court structure would reduce delay is an unfounded and misleading assertion.

4. *Costs*

The Attorney General proposes the salaries of all unified criminal court judges be paid by the federal government, with the Province to pay operating expenses and the cost of 3,500 court staff. The operating and staff expenses are currently paid by the

provincial government. The only saving to the public would be in administrative consolidation which does not require structural unification. As regards judicial salaries, the net effect of the proposal is to shift the salaries of all judges of the Provincial Court to the federal government. The salaries and benefits paid to the judges of the Provincial Court in Ontario alone would cost the federal government an additional $50,000,000. annually. Since there is a salary differential between the two courts, the cost of judicial salaries would increase. The public pays the salaries. There is only one public who will now have to pay for a more expensive justice system.

There is no cost saving to the public from court unification. If the preliminary inquiry remains there is no saving to the litigants from unification.

5. Precedents

While the concept of a unified criminal court has been debated for close to a century, very few jurisdictions have adopted one.

There is no jurisdiction in North America which has a separate criminal court with specialized judges. Several American states have a unified generalist trial court. However, most have an intermediate court of appeal, a structure not accepted in Canada. In addition, the Americans have a parallel federal court structure with criminal law jurisdiction covering each state.[45]

While not determinative, the experience in other jurisdictions, particularly the United Kingdom, with a justice system similar to ours, should inform the current debate. As the Joint Committee on Court Reform concluded, "The criminal justice system could be done irreparable harm by creating an untested vision in a jurisdiction as large as

Ontario."[46] We would add to that conclusion, in a jurisdiction as large and diverse as Ontario.

The Effects of a Unified Criminal Court

An examination of the following factors leads us to conclude a unified criminal court will create insurmountable problems. It would not solve problems but create new ones.

1. Court Size

There are 288 judges in the Superior Court and 255 in the Provincial Court. If a unified criminal court is to be a division of a single trial court with generalist judges, the trial court would have 543 judges. If the current 278 Justices of the Peace were included, the total would be 821 judicial officers. Managing a court of either size would be an administrative nightmare. Five hundred and forty three judges would be larger than the world's largest unified court, while 821 judicial officers would be twice the size of that court.[47] It is difficult to imagine such a court being efficient. The members of a court of either size would feel it difficult to act as part of a cohesive judicial body, rather than just individuals in a huge bureaucracy.

One of the hallmarks of a generalist court is the ability to rotate judges amongst the areas of law-specific divisions. With a huge court, that objective would be difficult, if not impossible. If the aim of restructuring is to better serve the public, the proposal fails.

2. *Circuiting*

If the proposal is to have a separate court of specialized judges, the proposal will result in a less efficient system and reduce service to Ontarians. Under the present system, Superior Court judges circuit for several weeks each year both inside and outside their own region, although less frequently for Toronto-based Judges. Circuiting judges sit in smaller communities where there is insufficient demand for full-time courts. While sitting in these centres, judges hear motions in family and civil law, criminal summary conviction appeals and pre-trial conferences. During jury sittings the judge will hear both criminal and civil cases. One judge can, and does, handle those functions daily or during a jury sitting. The smaller communities are well served.

Under the proposed unification, one judge would not be able to deal with all areas of law. Two or more judges would have to serve the community, likely on different days, to do part of the current list. The advantages of a generalist judge in these circumstances is obvious. It is difficult to see how unification would be more efficient or serve the public better.

3. *Hierarchy*

In past debates on unification, much was said and written about court hierarchy. At the outset it is important to distinguish between two very different concepts, hierarchy and status. Hierarchy relates to the levels of courts and is used in this paper only because of repeated references in earlier discussions. Status involves the alleged perception of an inferior quality of judge and justice in a lower court. As regards

hierarchy, it not only provides significant benefits to the public and the administration of justice, but unified courts do not remove it.

The Superior Court performs an important and essential supervisory function in relation to the Provincial Court. In dealing with bail reviews, summary conviction appeals and extraordinary remedies, the Superior Court provides a more efficient and less expensive method of dealing with appeals and reviews than proceedings in the Court of Appeal. Ontarians are better served having local recourse to these appeals and reviews by a single judge than having to proceed before three judges located a significant distance from the original proceedings.

The perception of impartiality is enhanced when an appeal or review is conducted by a judge of a different court. In addition, any proposal for appeals to judges of the same court will erode the principle of *stare decisis*. The effect will be less efficiency and, in some instances, confusion with conflicting decisions given by appellate judges of the same court.

In addition there is a need for institutional distance between the appeal level and trial courts to ensure the independence and integrity of the appeal court. This principle has been acknowledged by the Ministry of the Attorney General in the *Architectural Design for Court Houses*:

> The independence of the courts should be reflected in the planning of the building where possible. Justices of the Superior Court of Justice are required to review their Ontario Court of Justice counterpart's decisions through appeals and other "supervisory" activities. Therefore this functional requirement for separate identities must be observed when planning their respective judicial offices.[48]

In relation to trials, traditionally the judicial system has provided a different level of court based upon the nature of the crime itself, not the procedure by which it is tried.

This should be maintained. Where a serious crime is tried by the same judge in the same court system as a minor charge, the public may perceive all crime to be the same degree of seriousness.

Court unification does not eliminate hierarchy. Unification establishes a new hierarchy where cases are downloaded to subordinate judicial officers or separate groups of judges. In the United States, the federal court is a highly unified court structure but the pressure of workload, combined with concern for expense and accessibility, led to the development of a large "subordinate judiciary" within a unified system.[49] In Illinois, a large single trial court with generalist judges, there are "associate judges" for minor offences.[50] In Ontario, this phenomenon has already occurred with justices of the peace now conducting virtually all bail hearings as well as intake and assignment courts.

In 1987, the phenomenon was recognized by Zuber J. in the *Report of the Ontario Courts Inquiry:*

> The division of the courts by class of cases would mix the short and simple cases with the long and complicated. Inevitably, these specialist courts would have to establish a division to handle short, high-volume cases and a separate division for slow-moving, more complex cases and jury trials. Thus, in fairly short order, the basic three courts would multiply by the creation of internal divisions and soon the three would become six and the resulting system could be more complex than the system now.[51]

The 1991 Canadian Bar Association Task Force, after examining the American federal court system, noted their investigation suggested at least two things:

> First, there will always be a need arising from practical considerations and fiscal restrictions to have some form of lower court. Second, and following on the first, it will not be possible to eliminate judicial hierarchy as there is a systemic need for subordinate judicial officers.[52]

A second form of hierarchy is the practical result of unification. The Canadian Bar Association report, after examining the American State trial court experiences drew the following tentative conclusion:

> Unification rarely does away with hierarchy. It simply takes away some forms of hierarchy and substitutes others. ... Even in systems in which most judges have authority to preside in all courts, hierarchy is preserved by the authority of administrative judges to assign the more demanding or less interesting work to the judges under his or her direction. The elimination of hierarchy within the judiciary is unlikely to be achieved through unification.[53]

The existence of an actual hierarchy was implicitly recognized in the proposal of former Attorney General Scott:

> Judges may certainly continue to perform different functions but within a single court. ... The new court structure must ensure that judges of the highest quality are available to hear all criminal matters and that *the most difficult and important cases are directed to the best qualified judges.*[54] (emphasis added)

A hierarchy imposed by an administrative judge may very well be more difficult for some members of the judiciary to accept than one created by legislation.

4. ***Summary Conviction Appeals***

The appellate jurisdiction exercised by the Superior Court is, in some measure, a court of last resort for the majority of the criminal cases tried in the Province. Pursuant to s. 829 of the *Criminal Code* the Superior Court stands as the appeal court for all offences tried by summary conviction. Any further appeal is by leave of the Court of Appeal on a question of law alone.

There are five possible methods of hearing summary conviction appeals in a unified criminal court: first, by a single judge of the unified criminal court; second, three

judges of the unified criminal court; third, three judges of an intermediate court of appeal; fourth, a single judge of the Court of Appeal; and fifth, three judges of the Court of Appeal. All methods are fundamentally flawed.

As regards members of the same court hearing criminal appeals, while not perhaps meeting the test of reasonable apprehension of bias, it is surely unacceptable to the public to have members of the same court sitting on criminal appeals of other members of the court. What is acceptable in civil matters (the Divisional Court) should not be extended to criminal matters where the liberty of the subject is involved. This model would surely diminish respect for the administration of justice and lead to confusion. It is a model which has been generally avoided, with very limited exceptions, in criminal law.

In addition, there are obvious delay and expense issues associated with members of the same court sitting on appeal of one another, particularly where three judges hear the appeals. In effect, another court is created within the unified criminal court, leading to stratification in any event. Having three members of the unified criminal court hear appeals would also increase the costs to litigants required to file three copies, at least, of all material, as well as increased travel costs and reduced convenience - the parties would have to travel to central locations where the appeals would be held. This is independent of the cost of scheduling three judges to sit on these appeals.

Various reports of members of the Ontario Court of Appeal, including Justices MacKinnon and Brooke, have called for the creation of an intermediate Court of Appeal.[55] There is no recent activity on this front - the Court of Appeal has significantly

reduced its backlog. The creation of an intermediate court of appeal, is, in effect, the creation of another level of court beyond the unified criminal court and accordingly fails to reduce the hierarchical chain. The Superior Court is effectively an intermediate court of appeal and is increasingly recognized as such.

Uploading the appellate case load from the Superior Court to the Court of Appeal would soon paralyze that Court and increase its backlog. Even from a jurisdiction as small in terms of population as Nunavut, the increased workload of its Court of Appeal has been significant and unexpected. Uploading the current appeals to the Court of Appeal would also detract from the jurisprudential leadership of that Court. A larger Court of Appeal would diminish the consistency and predictability of the court. Having one member of the Court of Appeal hear the first level appeal with a final appeal to the Court of Appeal raises the same problems as discussed above regarding public confidence and perception.

Any proposal for summary conviction appeals to be heard outside the location of the offence ignores the important role geography plays in sentencing, and the response to local problems. The Superior Court, acting as a summary conviction appeal court and sitting in every county or district is, more so than the Ontario Court of Appeal, knowledgeable about local conditions and problems.

The objectives of efficiency and easier access to justice will not be met by any of these proposals, indeed they will be hindered by them. Any suggestion that three judges do what one judge does now is the antithesis of efficiency.

5. *Bail Issues*

The Superior Court exercises exclusive jurisdiction respecting initial bail applications for *Criminal Code* s. 469 offences (primarily murder, accessory after the fact to murder and conspiracy to commit murder), significant bail review jurisdiction under s. 520 and 521 of the *Criminal Code* and s. 8(6) of the *Young Offenders Act* and a supervisory function to review the pace of litigation in the Provincial Court under s. 525 of the *Criminal Code*. The comments above about conferring a review power on members of the same court are equally applicable to these areas, as are the comments about conferring this jurisdiction on the Court of Appeal. Of particular note is the anomaly that would result if one judge of a court were to review the pace of litigation of the same court.

6. *Extraordinary Remedies*

Currently, the Superior Court exercises the important and historical supervisory function respecting prerogative writs. The remedies of *certiorari, mandamus,* prohibition and *habeas corpus* have existed for hundreds of years. The review of committals to trial, of warrants, of the legality of detention of the citizen, and the exercise of other supervisory controls are all required in any orderly and efficient administration of criminal justice.

The extraordinary remedies, in particular *certiorari,* are considered to be discretionary remedies and as such the Superior Court is, as a general rule, the court of last resort respecting the review of decisions within the scope of the prerogative writs. As such, the prerogative writ jurisdiction has long stood as a significant area of

expertise within the Superior court. The above comments about members of the same court exercising appellate review and uploading to the Court of Appeal are applicable to extraordinary remedies.

If prerogative remedies are to be available for all trial court judges, (as in Nunavut) extraordinary delays with particularly injurious effects on jury trials would occur. The result would be delay, added cost, inconvenience to the jurors and potentially mistrials if the jury could not be re-assembled.

7. The Judiciary

While the focus of the Attorney General's proposal is service to the public and court efficiency, the position of the judiciary cannot be ignored. In the current system the public benefits from a highly qualified and dedicated judiciary in both trial courts. All sitting judges, after at least ten years at the bar, chose to end their practice and seek appointment to a specific court. Such a decision is not made in haste. It is highly individual, arrived at with considerable reflection. The current proposals undermine the choices made.

Current Appointments

There are two options for appointments to the unified criminal court. First, the current Provincial Court Judges would all be appointed to either a separate unified criminal court with specialist judges or to the unified criminal court division of a single trial court with generalist judges. On this scenario the balance of the judges required for either style unified criminal court would be drawn from the current Superior Court.

Second, as occurred with the Unified Family Court, the members of the Provincial Court who sought appointment to the unified criminal court would apply to the federal government for a new appointment. Either approach results in manifest unfairness to judges. If the first approach is adopted and all current Provincial Court Judges become unified criminal court judges, current judges of the Superior Court who left practice and sought appointment to a generalist court which would permit them to do criminal work would be excluded from criminal litigation permanently (if the unified criminal court is a specialist judge court) or for large periods of time (if the unified criminal court is a division of a single trial court). The second approach would leave some judges of the Provincial Court without a court and some members of the Superior Court excluded from criminal litigation when they sought appointment to a court which permitted them to hear criminal cases.

Future Appointments

The public is best served when candidates of the highest quality are appointed judges. Currently applications are received from specialist and general practitioners. On the approach advanced by former Attorney General Ian Scott, these benefits of the current approach would be placed in jeopardy, thereby risking a reduction in the quality of justice instead of increasing it.

The Scott proposal was based on specialization:

> Judges would be assigned to divisions which reflect their area of expertise. The structure encourages the best qualified candidates to seek appointment and ensures difficult and important cases are assigned to experienced and expert judges.[56]

In the area of criminal law, those with expertise would be Crown Attorneys, defence counsel and some law professors. Similar restrictions would apply in family and civil law. While it was suggested this would attract the best qualified candidates, it would also eliminate general practitioners or solicitors, many of whom have become exceptional jurists in criminal and other areas of the law. Since those who practice in smaller communities are predominantly general practitioners of necessity, appointing experts would not only eliminate general practitioners from applying but exclude almost all lawyers who practice in small communities. For potential applicants who prefer a variety of judicial duties, either style of unified criminal court would deter their application. We agree with the 1991 Joint Committee on Court Reform conclusion that it is not clear a more specialized court would attract the best qualified applicants.[57]

It would be a curious result if only specialists in criminal, family and civil litigation were to be appointed to specialized trial courts or divisions of a single trial court, when all judges of the Court of Appeal and the Supreme Court of Canada hear cases in all areas of law.

8. Facilities

With the exception of the consolidated courthouses found in less than twenty-five locations, Ontarians are generally served by smaller facilities for the separate courts. In Toronto, where roughly 30% of the criminal charges are laid, there are nine separate buildings of which only two are equipped for jury trials. Most of the criminal courts in the Province at present cannot accommodate jury trials. Accordingly, the public will not have more access to justice in jury trials in a unified criminal court.

If a unified criminal court were to be implemented, a likely result would be judges moving from court facility to court facility away from their offices, libraries and support staff. Instead of increased efficiency there would be inefficiency.

Absent a massive capital expenditure to build consolidated courthouses, the current facilities could not cope with structural unification.

In Toronto, a committee is looking at alternatives for the various downtown court buildings and has concluded a courthouse for both divisions would require 88 courtrooms, the largest in Canada and one of the largest in the world. There has been no commitment to date from the provincial government to fund such a project.

9. Constitutional Considerations

The earlier studies to which we have referred all raised the issue of constitutional concerns with unification. The 1982 New Brunswick attempt to establish a unified court was found to be constitutionally flawed by the Supreme Court of Canada.[58] While beyond the scope of this report it is important to consider the earlier reports and the issues raised.

THE QUEBEC MODEL

Quebec has two levels of criminal trial courts, the Quebec Court and the Superior Court of Quebec. The Quebec Provincial Court is the Quebec Court which has exclusive jurisdiction to try all non-jury trials, including indictable offences. Preliminary inquiries are held in the Quebec Court. If a jury trial is elected, the case proceeds in the Superior Court. If a non-jury trial is elected a judge of the Quebec Court (different from the preliminary inquiry judge in the absence of consent) hears the trial.

With preliminary inquiries, there is no reduction in the time required to complete an indictable trial as the two procedures remain. There are cases where the accused will elect a jury trial and after appearing in the Superior Court will re-elect, with the consent of the Crown, for a non-jury trial in the Quebec Court. This is the "back and forth" shifting of cases sought to be avoided. In the Ontario Superior Court, this sort of re-election occurs frequently, and is done in the same court, before the trial judge and takes only minutes to accomplish.

In his address at the opening of courts the Attorney General noted,

> ...nothing could be more abhorrent than the ultimate failure of the justice system, the loss of cases because of delay."

In our view, imposing the Quebec model as an interim or permanent solution in Ontario will hasten the "ultimate failure" of the justice system for countless cases. Assuming all current Superior Court non-jury trials would remain non-jury cases under the Quebec model, the result would be the transfer of 48% of the criminal law trials from the Superior Court to the Provincial Court.[59] It would threaten the creation of another *Askov* problem.

The most glaring impediment to improving efficiency with the Quebec model is inadequate judicial resources. There is no evidence to suggest the judges of the Provincial Court are not working to their capacity. From recent published reports they are maintaining the status quo in terms of delay in some areas, while in others they are falling behind. The administrative judge of the East Mall Court in Toronto noted his court was "at the edge" and "falling behind every month."[60] Newmarket, an area targeted in the blitz to remove backlogs has seen the time to trial increase in recent months.

It may be argued that judges of the Provincial Court now hear the preliminary inquiries so there would be no meaningful increase in their workload. This argument is fundamentally flawed. First, while counsel will elicit evidence at a preliminary inquiry on *Charter* issues in order to explore the feasibility of trial arguments and/or prepare an evidentiary foundation for a pre-trial motion, there is a significant difference between hearing some evidence on the issue and the full *Charter* application. At trial the Crown will often lead further evidence on the *Charter* issue. In addition, at trial full argument is presented on the *Charter* issues and a judgement, often reserved, is required. Any suggestion the time requirements are the same or similar is misleading.

However, preliminary inquiries can save time at trial. Often the *Charter* issue is not pursued and on other occasions the application record consists of the preliminary inquiry evidence. Having said that, as a general rule the time required for trials is considerably longer than for preliminary inquiries. Often at preliminary inquiries the Crown will call one witness such as the complainant in a sexual assault case. The hearing may take two hours or half a day. At trial, the case proceeds with *Charter*,

Seaboyer and O'Connor applications. The half-day preliminary inquiry becomes a ten day trial.

A second problem is scheduling in a court structured for trials the duration of which is measured in hours or half days instead of weeks. Working on calendars created for hours and days is not compatible with longer trials. If the case is not completed in the allotted time (a frequent occurrence) the result will be a lengthy adjournment to continue the trial, an unsatisfactory result. Perhaps in larger centres with more judges, having one or two judges engaged in multiple week trials would not create total chaos. Several judges engaged in long trials would. In smaller jurisdictions the court could not function with one or two courtrooms and heavy dockets if one or two judges were engaged in longer proceedings.

Finally, the current facilities will not accommodate an increased number of trials. The courthouses where the Provincial Court currently presides are generally being used to their capacity. Any increase would have to go to other courthouses, in some instances in other jurisdictions, which would impair the public's access to justice in their home jurisdiction.

Unless the Provincial Government is prepared to appoint many more judges and build new court facilities, the Quebec model will result in more delay, not less.

NUNAVUT

In April of 1999 the Nunavut Court was created to serve 26 communities, with a total population of 30,000 people. The largest centre is Iqaluit with a population of 5000. Some of the communities are as small as 200-300. The land mass is overwhelming, with Iqaluit north of Ottawa and Kuglugtug, the most westerly community, west of Edmonton.

Nunavut has a single trial court for all areas of law with generalist judges. It does not have a unified criminal court. At the present time, there are two full time and 20 deputy judges who travel to the communities. Significantly, the appeals, bail reviews and prerogative writs are heard in the Nunavut Court of Appeal by a single judge, not a judge of the Nunavut Court. Indictable appeals and summary conviction appeals, with leave, are heard by three or more Court of Appeal judges. As indicated earlier the uploading cases to the Court of Appeal has resulted in an unexpected increase in that Court's workload.

Whether a single trial court will work in Nunavut will be ascertained only after several years experience. Nunavut is not Ontario, nor is it a city or region of Ontario. The issues and challenges which arise in that territory are unique to the region. Given the size of the territory, the population, the types of cases and unique issues in Nunavut, neither the court structure nor procedures from that territory can be transferred to Ontario.

PILOT PROJECTS

Earlier proposals and studies have suggested a pilot project for a unified criminal court and/or the Quebec model. As for the Quebec model, the dangers of implementing that structure in any form are expressed earlier. As for the unified criminal court, any pilot project in one region or location in Ontario would inevitably invite *Charter* scrutiny under sections 7 and 15 which would have the potential to undermine the entire project.

There is a more fundamental concern for pilot projects involving altered court structures. While statistics can be collected, they can be distorted and manipulated. What cannot be measured statistically is the quality of justice. We have grave concerns that any pilot project would be evaluated on the basis of statistics alone, without consideration for the quality of justice.

RECOMMENDATIONS

We believe the court system can become more efficient and the public better served without jeopardizing the quality of justice in Ontario. Implementing the following recommendations will achieve the goals sought by the Attorney General.

1. ***Judicial appointments***

The federal and provincial governments should be encouraged to make timely appointments when vacancies occur. While both have procedures in place, the current pace of appointments is unacceptable and does not serve the public. It is inconsistent to champion the elimination of delay while delaying the appointment of judges.

2. ***Administrative unification***

Many of the concerns advanced as justification for structural unification relate to administration. Consolidation of the administration of the two trial courts might be explored in some regions where it would be operationally efficient to do so. When the *Integrated Justice* initiative is fully implemented this objective will be facilitated. In addition, that program should be able to provide more accurate information on the court system than is currently available.

3. ***Co-operation and co-ordination – Provincial and Local Co-ordinating Committees***

The *Criminal Justice Review* recommended the establishment of a provincial criminal justice co-ordinating committee composed of representatives of the key participants in the criminal justice system. Each court location would also set up a local committee. That report was released in February of 1999. While some steps have

been taken to establish the committees, they have yet to meet. This initiative will be an important component of a more efficient justice system. The pace of implementation must be accelerated.

These committees will be able to identify local and provincial problems and recommend solutions. The local component is particularly important in a jurisdiction the size of Ontario. A problem in Toronto does not automatically require changes in Thunder Bay.

4. Case Management

Case management has been an effective mechanism to improve efficiency in other areas of law. Although not extensively used in criminal law, it should be encouraged and expanded. Too often a case will start through the court process without being identified as one requiring special attention and co-ordination. While provincial and local guidelines should be established, the following types of cases are ones which would appear to benefit from a judge being assigned to case manage it from the first appearance at both trial levels. It would be the responsibility of the Crown Attorney and trial co-odinators to identify the cases:

(i) homicides,

(ii) conspiracy charges,

(iii) any case with three or more accused,

(iv) any case where the Crown indicates disclosure will not be available within a time determined appropriate by the provincial and/ or local committee,

(v) any case where the required court time court exceed three weeks,

(vi) any case in which multiple pre-trial motions are likely to consume three or more days.

5. *Disclosure*

The problems of disclosure have not been solved by caselaw requiring disclosure. Problems with this fundamental requirement for an efficient and fair criminal justice system continue to plague the courts of Ontario resulting in delay and loss of prosecutions.

The *Criminal Justice Review* produced a series of recommendations to improve disclosure. In addition the establishment of a permanent disclosure co-ordinating committee, the urgent need for co-operation and agreements on disclosure between police representatives and the Ministry of the Attorney General was noted. The inter-governmental dispute over funding contributes to delay, confusion and inefficiency in the courts. The remedy for this particular problem must be found by the provincial government.

On occasion, disclosure is an unsupervised and disorganized effort to provide "something" to the Crown and defence. Effective disclosure will make a more efficient justice system.

The absence of mandatory defence disclosure of expert witnesses can lead to delay. When a defence expert is called, the Crown will often need time to retain and consult its own expert, necessitating an adjournment in the trial. Where the defence is calling expert evidence, the defence should be required to disclose the name of the expert, his or her curriculum vitae and the nature of the evidence to the given.

We encourage the implementation of the complete set of recommendations outlined in the report which is included as appendix A to this report.

6. Pre-trial conferences

Pre-trial conferences are either meetings between counsel alone, or with a judge. Here we are concerned only with the judicial pre-trial conference. However, we do not wish to minimize the significance of counsel pre-trials which routinely restrict issues and result in resolutions.

There are two functions for pre-trial conferences. One is case management: What are the issues? Can they be reduced? What time will be required for the case? The second is exploring the potential for resolution. Both are essential components. Efficient pre-trial conferences serve the public and the administration of justice well. The *Criminal Justice Review* has proposed a series of recommendations to improve their efficiency. The complete series of proposals, which we support, is included in Appendix B to this report. A key component to the proposal is that all counsel must be fully informed and prepared to make commitments. In addition we encourage the adoption of the following suggestion from the report:

> The Criminal Justice Review recognizes that the judiciary in Ontario is highly qualified and able, but that not every judge may be suited to or interested in conducting judicial pre-hearing conferences. Administrative judges should give careful consideration to the selection of judges conducting pre-hearing conferences. Judges conducting pre-hearing conferences should be experienced in criminal law, knowledgeable with regard to the range of penalty for offences, and able to facilitate the resolution of issues.

7. *Preliminary inquiries*

Earlier we set out the persuasive arguments presented by those advocating the retention of the preliminary inquiry. Their arguments become more even persuasive when the preliminary inquiry is a focused examination of the triable issues. Two related recommendations of the *Criminal Justice Review* will enhance the efficiency of the hearings. First, the *Criminal Code* should be amended to permit issues such as continuity of exhibits, wiretap installation evidence and the contents of "911 calls" to be established by affidavit evidence. Second, the *Law Society Rules of Professional Conduct* should be amended to reflect what has always been the 'unofficial' position - clients determine only the forum of trial, whether there is a jury, how they will plead and whether they will testify (provided they can ethically be called).[61] This would require counsel to focus on the triable issues and prevent the position advanced on occasion: "My client will not permit me to admit anything."

Some preliminary inquires can be held out of court as examinations-for-discovery where committal is not in issue and occasionally this happens, thereby saving court time. Counsel should be encouraged to consider this option at pre-trial conferences.

Finally, a consultation paper from the Department of Justice recommended that a pre-trial judge decide what witnesses would be called and what issues would be canvassed at the preliminary inquiry. In most cases counsel can agree on the witnesses to be called and the issues to be addressed. Effective pre-trial conferences facilitate resolution of unresolved issues. If it is established by empirical data that preliminary inquiries are routinely not being restricted to triable issues, perhaps

amendments should be considered which would give the presiding judge authority to restrict witnesses and issues.

8. Superior Court intake

While the time between committal for trial and the first appearance in Superior Court does not contribute in any significant way to delay, it is an area which can be improved. For example, some regions have implemented a system whereby the Provincial Court trial office has the available pre-trial dates for Superior Court. When the accused is committed for trial, she or he is remanded directly to the pre-trial date, thereby avoiding assignment court appearances. It may also help to examine whether a minimum number of days should be permitted between committal for trial and first appearance.

These examples are not given to suggest that one system fits all jurisdictions. What works in Ottawa may not work in Windsor. One contribution of local co-ordinating committees will be their ability to implement local initiatives which may not use the same means to reach commonly shared objectives.

9. Legal Aid

Legal Aid is an essential component of a justice system which serves the public and the administration of justice. The problems of unrepresented litigants has been discussed elsewhere at length and need not be repeated.

Nevertheless, obtaining legal aid takes longer than retaining private counsel. In some jurisdictions, applicants are told the process will take about four weeks before a

decision is reached. This is a significant delay. Understandably, counsel are reluctant to appear on the record until retained. Pre-trial conferences cannot be held, resolutions are delayed, trial and preliminary inquiry dates cannot be set. Legal Aid Ontario should be encouraged to reduce the time required to process applications.

Recently, duty counsel have been available in Superior Court Family Law applications for support variations. Duty counsel could assist unrepresented accused in challenges for cause, pre-trial resolution issues and bail reviews. An expanded use of duty counsel should be explored, particularly where the local bar is not prepared to assist as *amicus curiae* or appointed counsel. Alternatively, Legal Aid should consider "task-specific" certificates to cover one phase of proceedings only.

Finally, we encourage Legal Aid Ontario to expand the use of case management techniques for long trials which provide counsel with a budget similar to that of counsel on private retainers, as opposed to what some counsel regard as open-ended legal aid certificates.

As with the other recommendations, these should not be examined in isolation. Forcing unrepresented accused on for trial invites an order for a new trial. Some delay in having counsel retained enhances efficiency when the alternative is one trial within a publicly acceptable timeframe, plus a second trial, required because an accused was forced on without counsel.

10. <u>Uncontested applications</u>

Criminal law practice and procedure currently requires court appearances for every event. Consideration should be given to permitting uncontested applications such as bail variations to be brought in writing without the necessity of court appearances.

11. Time limits

At common law, judges of both trial divisions have authority to place time limits on oral argument and/or require written submissions. If necessary such authority could be included in the rules of court. In the Supreme Court of Canada and the Court of Appeal for Ontario, rules stipulate the length of mandatory facta and time limits for oral argument. There is no evidence to suggest the quality of advocacy or representation is diminished when limits on facta and argument are imposed. Particularly in complex and lengthy matters, judges should be encouraged to use both time-saving mechanisms.

CONCLUSION

The citizens of Ontario benefit from the high quality of criminal justice currently administered in the two trial courts. Quality should not be jeopardized by attempts to improve efficiency through proposals aimed at solving problems which, on analysis, are unrelated to court structure. In the tradition of the bench and bar in criminal matters, co-operative solutions can be found to improve efficiency while maintaining quality. Solutions such as a unified criminal court, the Quebec model or the elimination of the preliminary inquiry do not address the real problems, but instead create a substantial risk of inefficiency and the impairment of the excellent quality of the criminal justice system in Ontario.

APPENDIX "A"

CHAPTER FIVE: CROWN DISCLOSURE

5.1 Full and timely Crown disclosure is an essential component of an efficient criminal justice system. In order to ensure that efficient disclosure practices are instituted and maintained across the province, the Criminal Justice Review Committee recommends that the Attorney General and Solicitor General of Ontario, in co-ordination with federal policing and prosecution authorities, establish a permanent disclosure co-ordinating committee.

5.2 It is urgent that a new and effective Memorandum of Understanding be negotiated between police representatives and the Ministry of the Attorney General as soon as possible.

5.3 The proposed Attorney General and Solicitor General's co-ordinating committee on Crown disclosure report on a regular basis to the proposed provincial criminal justice co-ordinating committee.

5.4 In the absence of exceptional circumstances, disclosure should be provided to an accused at his or her first court appearance.

5.5 Two copies of the disclosure materials should be prepared by the police at the outset – one for the Crown and one for the defence. In cases involving multiple accused, the police should prepare one copy of the disclosure materials for each accused.

5.6 Every police force in the province should be required to designate an appropriate number of disclosure officers, who will be responsible for reviewing all police briefs to determine whether the briefs: (a) are complete; and (b) comply with quality control standards.

5.7 Only briefs which are approved by a disclosure officer should be forwarded to the Crown. All other briefs should be remitted back to the investigating officer with an indication of what improvements / additional materials are required.

5.8 Disclosure officers should be of high rank and should be empowered to take appropriate action when officers fail to make full and timely disclosure to the Crown or to respond to Crown requests for additional materials or investigative work in a prompt and courteous manner.

5.9 Uniform quality control standards be implemented across the province. At a minimum, those standards should stipulate that all police briefs must:

(a) be paginated;

(b) include an index; and

(c) contain a meaningful synopsis of the case. The synopsis should include a list of police and civilian witnesses and a summary of each witness's anticipated evidence which clearly articulates the significance of that evidence.

5.10 Checklists should be used to monitor the timing and content of disclosure. All disclosure should be dated and the brief flagged so that the Crown is aware when additional disclosure has been added to the brief after the accused's first court appearance.

5.11 The accused is entitled without fee to basic disclosure as defined in the *Martin Committee Report*.

5.12 Each accused is entitled to one copy of the basic disclosure materials. Accordingly, where an accused requests an additional copy or copies (*e.g.*, because the original materials have been lost), then the accused may be charged a reasonable fee for this service.

5.13 That basic and in service training programs continue to stress the importance of effective and efficient witness interviews and how audio and video taping can enhance rather than hinder the statement taking process.

5.14 The proposed Crown disclosure co-ordinating committee develop, on a priority basis, a comprehensive, province-wide policy on the disclosure of audio and video taped evidence for consideration and implementation by the proposed provincial criminal justice coordinating committee.

5.15 In the absence of a comprehensive, province-wide policy, the issue of whether the Crown will be required to produce a transcript of a recorded statement, or portions thereof, should be resolved by agreement between counsel, or, at the latest, at a judicial pre-trial conference.

5.16 The proposed permanent disclosure co-ordinating committee should develop a comprehensive, province-wide policy on the transcription of witness statements for consideration by the proposed provincial criminal justice co-ordinating committee.

APPENDIX "B"

CHAPTER SEVEN: JUDICIAL PRE-HEARING CONFERENCES

7.1 The Criminal Justice Review Committee recognizes that there is no single system for the scheduling and conducting of pre-hearing conferences which is suited to all court locations in the province. To date, each location has developed its own system for conducting judicial pre-hearing conferences and it is desirable that each location continue to experiment with, and refine, its own system to suit local conditions.

7.2 A Commentary to Rule 10 of the *Professional Conduct Handbook* be added concerning the role of defence counsel at a judicial pre-hearing conference.

7.3 The proposed local criminal justice co-ordinating committees consider adopting the following "best practices":

(a) No judicial pre-hearing conference should be held until a conference (either by telephone or in person) has been held between counsel. Telephone counsel conference meetings should be encouraged wherever possible, bearing in mind that it is never acceptable for a secretary or other support staff to telephone in the place of counsel.

(b) No judicial pre-hearing conference should be held until the Crown has made initial disclosure.

(c) Where possible, judicial pre-hearing conferences should be scheduled on a remand date. This will ensure that, if necessary, defence counsel is able to confer with his or her client without delay.

(d) A duty court or judge should be made available whenever judicial pre-hearing conferences are scheduled.

(e) At the request of either Crown or defence counsel, the investigating officer should attend the judicial pre-hearing conference.

(f) Where defence counsel feel it is desirable for the investigating officer to attend judicial pre-hearing conferences, or be available to answer questions, he or she should communicate that to the Crown at the counsel pre-trial.

(g) Where defence counsel is going to present information or evidence to Crown counsel for the Crown's consideration, and it can be reasonably anticipated that the Crown will be required to make additional inquiries as a result of that information, defence counsel should do so at the counsel pre-trial so that the judicial pre-trial need not be adjourned.

7.4 A judicial pre-hearing conference be mandatory where it is anticipated that a matter will involve a half-day or more of court time.

7.5 To the extent that the recommendations of the Martin Committee with regard to judicial pre-hearing conferences have not been implemented, the Criminal Justice Review Committee recommends that the Attorney General of Ontario take immediate steps to implement the recommendations. Specifically, Crown counsel attending at a judicial pre-hearing conference must be experienced and must have full authority to deal conclusively with issue resolution and guilty pleas.

7.6 Defence counsel attending at a judicial pre-hearing conference should attend with complete instructions and have authority to deal conclusively with the matter.

7.7 At a minimum, the following issues should be addressed at every pre-trial conference:

(a) whether counsel wish to raise any issues with respect to disclosure;
(b) whether the continuity of the physical or documentary evidence can be waived, waived except for certain specific exhibits or documents, or dealt with by way of affidavit evidence;
(c) whether, in a document-intensive case, affidavits pursuant to ss. 29 and 30 of the *Canada Evidence Act* with regard to business records or records of financial institutions can be waived;
(d) whether there are witnesses who can be waived or whose evidence can be agreed to;
(e) where a preliminary inquiry is to be held, whether an out of court discovery is appropriate for any or all witnesses; and
(f) whether written submissions on legal or evidentiary issues can be provided to the presiding judge, rather than oral argument.

7.8 The Criminal Justice Review Committee recognizes that the judiciary in Ontario is highly qualified and able, but that not every judge may be suited to or interested in conducting judicial pre-hearing conferences. Administrative judges should give careful consideration to the selection of judges conducting pre-hearing conferences. Judges conducting pre-hearing conferences should be experienced in criminal law, knowledgeable with regard to the range of penalty for offences, and able to facilitate the resolution of issues.

ENDNOTES

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[4] Comments at the Opening of Courts, 2000, by The Honourable Chief Justice Patrick LeSage, Appendix A.

[5] Fourth Triennial Report (footnote 9), pages 1, 2, 25-28.

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[8] Ministry of the Attorney General Court Statistics Report, Fiscal Year 1998/1999.

[9] One Trial Court: Possibilities and Limitations, 1991, Carl Baar, p.39.

[10] see footnote 4.

[11] Survey of Regional Senior Justices, May 12, 2000

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[13] Toronto Superior Court, Special Assignment Courts, Dec. 15, 1999 and Jan. 19, 2000.

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[15] A.W. Mewett, Editorial, Criminal Law Quarterly, Vol.32, Number 4, Sept. 1990.

[16] Telephone interview with Ron Brown, Supervisor, Los Angeles Public Defenders' Office.

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[23] *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.); *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) (S.C.C.) 257.

[24] *Criminal Code*, s.278.1 to 278.91.

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[26] *R. v. Stinchcombe* (1991), 68 C.C.C (3d) 1 (S.C.C.).

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[28] *R. v. Rockey* (1996), 110 C.C.C. (3d) 481 (S.C.C.); *R. v. U.(F.J.)* (1995) 101 C.C.C. (3d) 97 (S.C.C.);

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[31] Footnote 26 p.85.

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[33] The Causes of Popular dissatisfaction with the Administration of Justice, Address delivered at the America Bar Association convention in 1906, by Harvard Law School Dean, Roscoe Pound: Journal of the American Judicature Society, Vol. 46, August, 1962.

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[42] Footnote 37, p.18.

[43] Toronto Star, Feb. 1, 2000.

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[45] Footnote 34.

[46] Footnote 37, p.17.

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[58] *McEvoy v. Attorney General (New Brunswick)*, [1983] 1 S.C.R. 704.

[59] Footnote 12

[60] Globe and Mail, March 23, 2000.

[61] This position is supported by the Supreme Court of Canada judgment in *R. v. G.D.B.* [2000] S.C.J. No.22 at para. 34.